

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS A. DEL VALLE,	*	Case No. 10-CV-5210 (ERK)
	*	
Plaintiff,	*	Brooklyn, New York
	*	May 24, 2011
v.	*	
	*	
INTERNATIONAL UNION OF	*	
OPERATING ENGINEERS, et al.,	*	
	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	ANTONIA KOUSOULAS, ESQ. Kousoulas & Associates 41 Madison Avenue, Suite 4000 40th floor New York, NY 10010
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For the Defendant:	VINCENT MICHAEL GIBLIN, ESQ. RAUL GARCIA, ESQ. Pitta and Giblin, LLP 120 Broadway, 20th floor New York, NY 10271
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1 (Proceedings commenced at 3:35 p.m.)

2 THE CLERK: Civil cause for initial conference,
3 docket no. 10-CV-5210, DelValle v. International Union of
4 Operating Engineers. Please state your appears for the
5 record.

6 MS. KOUSOULAS: Antonia Kousoulas for Louis
7 DelValle.

8 THE COURT: Good afternoon.

9 MR. GIBLIN: Good afternoon, Judge. Vincent Giblin
10 and Raul Garcia with Pitta and Giblin on behalf of the
11 International Union of Operating Engineers.

12 THE COURT: All right. Welcome to all of you.

13 Please be seated and you're welcome to remain
14 seated during this proceeding.

15 First of all, I received an ECF bounce either today
16 or late yesterday. I don't recall which, in which one of the
17 parties -- and I don't recall which side, filed automatic
18 disclosure.

19 Under the Federal Rules of Discovery, documents are
20 not to be filed with the court unless they specifically
21 relate to an issue pending before the court.

22 So from here on in, please, you serve discovery on
23 the other side, but do not file it unless it's required in
24 connection with an issue pending before the court.

25 Before we turn to scheduling, I'd like to get a

1 better sense of the underlying facts in the case. I've read
2 the pleadings, so I have a picture of what the plaintiff is
3 alleging. What is the defendant's version of what was
4 happening here?

5 MR. GIBLIN: Local 14 is a union that essentially
6 operates heavy equipment. If you look out in the sky, you'll
7 see tower cranes and other types of equipment that the union
8 and the members are responsible for operating, maintaining
9 and the like.

10 They operate a referral hall through which members
11 are referred out. There's a formal process for that to
12 happen.

13 Under federal labor law, a referral hall, as
14 opposed to an exclusive hiring hall, is a place where
15 individual members can go out and solicit their own work so
16 they can operate the equipment.

17 Exclusive hiring halls are a little bit different
18 in the sense where a member is precluded from doing that.

19 As it relates to the master mechanic position, that
20 is a creature of collective bargaining. Essentially, the
21 collective bargaining agreement -- the collective bargaining
22 agreement specifies that when certain manning conditions are
23 reached, namely, how many operating engineers are performing
24 bargaining unit work in any one particular location. Most of
25 the collective bargaining agreements, if not all, specify

1 five.

2 So in that situation most of the power cranes that
3 you see in the sky have two operating engineers on them; one
4 kind of maintenance and one kind of business end. So when
5 you see them, when the critical mass of five is reached,
6 there is a collective bargaining agreement provision that's
7 triggered and the union is afforded the ability to assign a
8 master mechanic to the location, subject to the consent of
9 the employer who is responsible, or the signatory to the
10 contract.

11 In all these situations, each of the -- it's kind
12 of a little bit different based on the pleadings. We're
13 still doing some investigation, Judge. But each one of the
14 projects is a little bit unique. You talk about the Delta
15 terminal at JFK, which is one of the positions that Mr.
16 DelValle apparently sought in writing.

17 There are certain characteristics of that job that
18 may be different than lead appointment positions or master
19 mechanic positions that he may have held back in the '90's.

20 Just because it's operating engineers, just because
21 it's equipment, there's a lot of different factors that go
22 into the discretion that's afforded the business manager.
23 He's essentially the CEO of the union and the employer about,
24 you now, who was picked and how that's assigned.

25 It's the union's position at all times they

1 fulfilled the collective bargaining agreements and they
2 assigned individuals that were qualified for those positions
3 and there was no racial or discriminatory motive in that
4 selection process at all.

5 More importantly, what I think the record will bear
6 out -- we're still kind of taking a look at this -- Mr.
7 DelValle was one of the top wage earners of Local 14 in
8 total. So if wages -- you know, the W-2 wages that an
9 operating engineer normally puts in his pocket and brings
10 home to his family.

11 On the other side of that there are multi-employer
12 benefit funds; pension, welfare, annuity, which is
13 essentially a 401(k) and some other benefits that employers
14 agree to pay a fixed monetary amount into, which is openly
15 administered by a joint board of union employer trustees, and
16 based on the plan documents, summary plan descriptions and
17 the like, there's vesting in a pool -- formulas that are at
18 play.

19 And what we expect the record to bear out in both
20 of those situations, both the wages and the benefits, is that
21 Mr. DelValle was -- you know, at the top of the wage earner
22 side of things with Local 14.

23 And when you think about how -- you know, having
24 steady employment as an operating engineer because there's no
25 manning threshold, sometimes having a long-time -- a long

1 term job as an operating engineer, as opposed to one that
2 could be subject to elimination based on a reduction in force
3 or a closing of a particular area of the project where the
4 number goes from five to four could actually be a benefit to,
5 in this case, Mr. DelValle.

6 So one of the things that we're going to really
7 take a hard look at is whether Mr. DelValle, even if those
8 allegations were true, that he was damaged.

9 We suspect that the monetary amounts that he gained
10 or earned in wages and benefits will show that there was no
11 damage at all.

12 But I just want to emphasize that the union
13 operates in a lawful, bona fide manner with no discrimination
14 at all in this regard.

15 And I think a fair review of the complaint even
16 bears that out. This isn't a situation where there's an
17 allegation at all about a racial epithet. Any insensitive
18 statement about national origin or the like, so that kind of
19 takes us out of one category and brings us into the disparate
20 treatment and impact, which becomes more statistical and more
21 empirical, as opposed to your, you know, core discrimination
22 case.

23 We believe that the absence of those statements
24 really illuminate, you know, what was going on during that --
25 there was, in fact, no discrimination at all and whatever

1 policies or selection criteria were there, were all done with
2 proper purposes and motive.

3 THE COURT: You mentioned that the plaintiff was
4 one of the top wage earners and then you referred to benefits
5 and I thought you were going to say that the was also at the
6 top in connection with the benefits that he received.

7 You didn't say that, and I'm not sure if you
8 weren't applying it.

9 MR. GIBLIN: I blended the two concepts. At the
10 end of the day, the manner in which certain benefits are
11 accrued, based on a quarterly measuring and work hours within
12 those time periods, what you'll see is for all quarters Mr.
13 DelValle reached the necessary hours to insure himself and
14 his family he had the necessary work hours to have pension
15 credits, which ultimately if there's no break in service
16 somewhere down the road, he'll enjoy a vested credit, or a
17 pension, according to the plan rules and 401(k) is a fixed
18 hourly sum, no different than any of us that have the benefit
19 of that where there's a fixed hourly sum that goes into
20 account that is -- you know, put into a 401(k).

21 THE COURT: All right. Thank you.

22 Ms. Kousoulas, do you want to respond?

23 MS. KOUSOULAS: With regard to being a top wage
24 earner, the only thing I can say, Your Honor, is that my
25 client, through his own efforts, has managed to keep his

1 salary at a level that one may consider, you know, high.

2 I don't have records to compare that -- his salary
3 to anyone else's at this stage, so I really don't know, based
4 on information I have from my client. It doesn't appear to be
5 the case.

6 As I understand it, master mechanics can earn
7 \$400,000 per year. Operators can sometimes earn \$200 per
8 year.

9 My client gets up very early in the morning,
10 travels to the hall to make sure that he's able to get as
11 much work as possible so he can support his family.

12 I don't think that the defendant should take credit
13 for that. I mean, clearly, he has not been assigned to any
14 long-term master (inaudible) master mechanic position since
15 he's complained about discriminatory practices. He has not
16 been assigned to any long-term project. The longest I
17 believe in the past year and a half have been three weeks.

18 Sometimes he's assigned for a day, or two days, or
19 three days and he has to get up very early in the morning to
20 go to the hall and get other piecemeal assignments and the
21 like.

22 I believe by his estimate he had been assigned to
23 53 or 54 different job sites that are given out on a first
24 come, first serve basis. You have to get to the hall early
25 enough (inaudible) in the course of the past year.

1 This is also -- raises issues of retaliation and
2 one thing -- and, again, I'm looking into this because I just
3 got word from my client is that he was removed for not -- his
4 name was not forwarded to the -- voted in as a teller for the
5 union, and that's a position he had for a long time and this
6 was the first year that (inaudible) consideration for that
7 position. We think it's retaliatory. Again, this is a
8 recent development. It's (inaudible).

9 THE COURT: All right. Is there anything else any
10 of you would like to raise before we turn to scheduling?

11 MR. GIBLIN: Just -- I just want to clarify. The
12 union operates a referral hall for all members in the
13 morning. If they haven't solicited their work, they go to a
14 designated location where calls come in from employers
15 seeking work.

16 And the way that it operates is by -- on a first
17 come, first serve basis.

18 So the operation of the referral hall has nothing
19 to do with discrimination. It has everything to do with
20 fairness. This is the marketplace where people come and the
21 first person in the door that has a particular qualification
22 gets called out, announced and then the job is assigned that
23 way. It's a function of labor law.

24 So, you know, if, in fact, a premium job came in
25 that Mr. DelValle hypothetically was eligible for but he was

1 lower on the list that day because somebody else actually
2 signed in or stamped in first, it would be a de facto
3 violation of federal labor law to assign that to somebody
4 else.

5 So I think a lot of this, not a lot of people --
6 and you know, myself, you know, had chose this side of the
7 career, get this deep into labor law, construction law and
8 the like.

9 But I just encourage the court to have an open mind
10 about these kind of fine or more technical points of labor
11 law because -- with an open mind and when we put the facts in
12 I think the true state of affairs will reveal itself.

13 THE COURT: All right. Have you conferred and
14 completed the questionnaire that accompanied the order
15 scheduling this conference?

16 MR. GIBLIN: Yes, Judge.

17 THE COURT: Would you hand up a copy to Ms. Field,
18 my law clerk.

19 Automatic disclosure has not been completed by the
20 plaintiff yet.

21 MS. KOUSOULAS: That's correct, Your Honor. I
22 prepared my -- I wanted my client to review them before I
23 (inaudible).

24 THE COURT: Is there any reason why that can't be
25 served by the end of the week?

1 MS. KOUSOULAS: Probably not.

2 THE COURT: All right. I'll give you until Tuesday
3 to do it, because the order scheduling this conference had
4 directed the parties to complete automatic disclosure before
5 today. So that's the 30th of May.

6 All the dates and deadlines that I give you today
7 will be incorporated into a calendar order which will be
8 entered into the ECF system.

9 So if you're registered for ECF, and you should be,
10 if you filed a notice of appearance, you'll be able to
11 retrieve a copy of the calendar order.

12 You've asked to have until January 20th to complete
13 fact discovery. Do you really need that much time in this
14 case?

15 MS. KOUSOULAS: Your Honor, the only reason we're
16 asking for that is since the defense in this case, or a part
17 of the defense is that they merely procured labor on behalf
18 of employers and it was the employers who were decision
19 makers in who they chose to serve as the master mechanic.

20 And to that extent, if we're going to get into
21 that, and that's why I proposed it to (inaudible). Obviously,
22 I would start with the union officials.

23 But if they're taking the position that this was
24 really a decision that was taken by the employers, then
25 there's going to have to be some fairly extensive either

1 third party deposition discovery with regard to each and
2 every position and which employer was involved and what was
3 the process that was involved in those cases.

4 And that's why we are exercising some caution here
5 in realizing that we probably have to complete at least four
6 or five depositions -- or four depositions of parties. That
7 we may have to take non-party depositions and those could be
8 complicated (inaudible) get discovery first, find out who
9 these are, serve subpoenas, you know, and try to get
10 everyone's schedule together.

11 And logistically I'm just realizing that that could
12 take a longer time --

13 THE COURT: Mr. Giblin, were you suggesting that --
14 and maybe you were and that isn't the inference that I drew.
15 Are you suggesting that it's the employers who select the
16 master mechanics?

17 MR. GIBLIN: I think each situation will present
18 its own unique set of facts. But at the end of the day
19 there's a contractual provision in the collective bargaining
20 agreement that governs.

21 There is collaboration or discussion about the --
22 you know, two parties in the bi-lateral contract about the
23 selection and, therefore, it may be that there is liability
24 out there for some other party.

25 I don't have the information. We're still trying

1 to identify the particular job sites, (inaudible), and the
2 like that are out there, and -- but what I can say is it's
3 not that the union abandons their obligation under the
4 contract. It's a -- I want to say a joint appointment. But
5 there's rights involved that each party holds during that
6 selection process.

7 THE COURT: All right. Well, I will grant the --
8 since we're talking about fact specific evidence as to the
9 various jobs and I've heard about -- that there are dozens of
10 jobs just in the last year, I will give the parties until
11 January 20th to complete fact discovery.

12 I'm going to give you a single date for amending
13 the pleadings and bringing in additional parties as of right.
14 It doesn't mean that you cannot -- that you cannot amend
15 after that date. It just means you would need further leave
16 of the court to do that.

17 You've asked to have until -- well, dates between
18 August and October for doing that. I will give you until
19 September 9th for amending the pleadings and bringing in
20 additional parties as of right.

21 What kind of experts do the parties have in mind?

22 MR. GIBLIN: At this stage, Your Honor, we don't
23 have an expert, but (inaudible). I don't know, for example,
24 we may need an expert on damages or (inaudible).

25 But this situation here is not your typical

1 employment/employee relationship and how compensation is
2 earned or how much one would have earned, let's say, as a
3 master mechanic (inaudible). But at this stage I have not
4 made that decision (inaudible).

5 THE COURT: And what kind of experts is the defense
6 thinking of?

7 MR. GIBLIN: With respect to medical, we would
8 expect independent medical examinations, because there are
9 mental and emotional damages asserted.

10 We would expect treating physician's records to be
11 either produced or authorizations given so we can
12 individually solicit them. I'm not sure how Your Honor views
13 treating physicians, whether you consider them expert or
14 factual, but that's a line that we'd like to --

15 THE COURT: Rule 26 has been amended to address
16 that issue.

17 MR. GIBLIN: With respect to non-medical, we would
18 envision a statistical expert, especially given the disparate
19 impact charge.

20 Corporate governance, an individual that could come
21 in and actually explain to a jury the different positions
22 within operating engineers and just the functions, rights and
23 responsibilities under their internal government documents.

24 And then lastly we would have a damage expert that
25 would be -- hopefully, it would be one person. Just be a --

1 there's a claim of lost wages and lost future earnings, and
2 then hopefully the same person can conduct the actuarial and
3 other kind of forensic studies for pension calculations and
4 the like to the extent damages can be proven.

5 THE COURT: Is the plaintiff claiming that he
6 suffered any physical or medical consequences for which he
7 required treatment as a result of the alleged discrimination?

8 MS. KOUSOULAS: Not beyond the standard, you know,
9 emotional distress and resulting physical manifestations of
10 that.

11 THE COURT: But did he receive treatment? Did he
12 go to a psychiatrist or therapist?

13 MS. KOUSOULAS: He has not, Your Honor, but he
14 (inaudible).

15 THE COURT: For conditions that you say were caused
16 by the discrimination?

17 MS. KOUSOULAS: Caused or a manifestation of
18 emotional distress.

19 THE COURT: Well, to the extent that he is claiming
20 that he suffered any kind of medical or psychological
21 distress requiring treatment, authorizations for those
22 records should be provided as part of the automatic
23 disclosure.

24 What I'm going to do is -- unless someone thinks
25 that this is not the appropriate way to proceed -- bifurcate

1 discovery, defer scheduling expert disclosure, rather than
2 scheduling it at this time what I'd like to do is set this
3 down for a settlement conference either at the conclusion of
4 fact discovery or while fact discovery is ongoing.

5 It seems to me based on what I've heard that this
6 is the kind of case where there can be meaningful settlement
7 discussions even before expert disclosure has been exchanged.
8 Does anyone disagree with that assessment?

9 MS. KOUSOULAS: No, Your Honor.

10 MR. GIBLIN: We are always interested in pursuing
11 settlement negotiations.

12 THE COURT: All right. So at what point in time are
13 you in agreement that it makes sense to have a settlement
14 conference? At the conclusion of fact discovery or while
15 fact discovery is still being conducted?

16 MR. GIBLIN: We've an insurance carrier involved as
17 well, so the general practice with this carrier is at the
18 close of fact discovery to have a communication and if, in
19 fact, they approve some type of settlement authorization, to
20 bring that to court, as well as the insurance representative
21 as well.

22 THE COURT: So you do not think it would be
23 productive to have the settlement conference earlier; for
24 example, in the fall?

25 MR. GIBLIN: Not with this particular carrier, but

1 if it was the court's position that that was something you
2 were looking for, I'd communicate that back to the carrier.

3 Clearly, it needs to be after a substantial number
4 of depositions have occurred, including the plaintiffs. We'd
5 have to figure out whether there were other third parties
6 that could potentially be culpable. There may be
7 indispensable parties and I just think that that may
8 complicate -- until that's really resolved, it may complicate
9 things a bit.

10 If the court -- one possible situation would be to
11 have a telephonic conversation somewhere in that time frame
12 that we're talking about and then if, in fact, it's
13 progressed to a certain period, we may be able to bring
14 people in to discuss but I'd hate to schedule it and have
15 people in if we can't -- if we're not at a posture --

16 THE COURT: Well, I can put this down any time --
17 for conference any time I want, but I don't want to go
18 through meaningless exercise.

19 If this carrier wants to have all the depositions
20 completed, then I don't think it makes sense to have an
21 earlier settlement conference.

22 And the way I do settlement conferences, I do them
23 in person, not over the phone. They're very detailed and
24 involved. I have discussions with both sides here, then
25 privately and off the record and it's not -- telephone

1 conferences are not conducive to that kind of settlement
2 approach.

3 Let me ask Ms. Kousoulas, when would you ideally
4 like to have the settlement conference?

5 MS. KOUSOULAS: As soon as possible, Your Honor.
6 Our position is Mr. DelValle continues to work and get jobs
7 through the union.

8 It seems that progressively things are getting
9 worse for him and if we can stop the bleeding, I think in
10 some ways it will also help resolve this case.

11 If he spends funds litigating this and things get
12 worse, then there may be a point of no return for both
13 parties.

14 So my position is as soon as we could have a
15 meaningful settlement discussion, I would like that.

16 THE COURT: Well, based on what I've heard about
17 the issues in the case, I don't think it makes sense to have
18 a settlement conference with the court until there's been
19 some significant fact discovery.

20 So I think that at the earliest it should be in the
21 fall and I'm prepared to put it down for a settlement
22 conference in the fall.

23 I would like to have clients present. That would
24 mean the plaintiff and if the carrier is the decision maker,
25 then a representative of the carrier with authority to settle

1 the case.

2 If it turns out that the parties conclude that they
3 need more discovery and would like to have the settlement
4 conference put off, I'm prepared to accommodate you, but I do
5 ask that you please don't show up at the settlement
6 conference only to tell me that you need more discovery.

7 Once you reach the conclusion that the conference
8 would be premature, speak with opposing counsel, see whether
9 or not you're in agreement and then send a letter to me
10 through ECF indicating when you would like to have the
11 conference, and the fact that you'd like to have it put off.

12 So let's put this down for a conference on October
13 14th at 2 o'clock. And as I said, clients should attend.

14 At that time, if it appears that the case isn't
15 going to be resolved, I will schedule further proceedings in
16 the case either expert disclosure, dispositive motions or
17 both. I'm not going to set any deadlines now for dispositive
18 motions.

19 Are there any other dates or deadlines that any of
20 you would like included in the calendar order?

21 MR. GIBLIN: Nothing from the defendant.

22 MS. KOUSOULAS: No.

23 THE COURT: Let me just go through some
24 housekeeping matters with you.

25 As I said, the calendar order will be entered into

1 ECF. I expect you to comply with these deadlines.

2 If you do need a modification of any of the dates
3 or deadlines, as I indicated a moment ago, speak with your
4 adversary and then send a letter through ECF indicating what
5 change you need, why you need it, and whether it's on consent
6 or not.

7 The questionnaire, unlike the calendar order, is
8 not going to be entered into the court file. It's not being
9 so ordered by me. It's essentially for my information only.
10 It goes in my work file, but not into the court file. Not
11 into ECF.

12 Those questions that deal with the scope of
13 discovery I leave it up to counsel to modify on consent
14 without further leave of the court.

15 So, for example, if it turns out you want
16 additional depositions or additional requests to admit, or
17 interrogatories, just speak with your adversary.

18 If you're able to work it out informally, and I
19 hope you can, I don't need to hear from you about that.

20 If, however, you are unable to resolve a discovery
21 issue, despite good faith efforts to do so, the way to raise
22 a discovery dispute with the court is by sending a letter to
23 me, not to Judge Korman, unless you're filing an objection
24 from one of my discovery rulings.

25 The letter should be three pages or less. Any

1 attachments do not count toward the three-page limit. And
2 the three-page limit applies both to the application, as well
3 as to the response.

4 I think that covers everything that I had intended
5 to. Is there anything else that any of you would like to
6 discuss today?

7 MS. KOUSOULAS: No, Your Honor.

8 MR. GIBLIN: No, thank you.

9 THE COURT: Okay. Thank you very much.

10 (Proceedings concluded at 4:17 p.m.)

11 I, CHRISTINE FIORE, Certified Electronic Court Reporter
12 and Transcriber and court-approved transcriber, certify that
13 the foregoing is a correct transcript from the official
14 electronic sound recording of the proceedings in the above-
15 entitled matter.

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18 _____ June 29, 2011

19 Christine Fiore, CERT
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